IN THE

Supreme Court of the United States

October Term, 1960

No. 486

DANTE EDWARD GORI,

Petitioner

—v.—

UNITED STATES OF AMERICA.

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION *AMICUS CURIAE*

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Interest of the New York Civil Liberties Union

The New York Civil Liberties Union, an affiliate of the American Civil Liberties Union, appears as *amicus curiae* with the written consent of both parties. The Union, a non-profit, non-partisan membership corporation is organized to encourage and foster the rights guaranteed by the Constitution and endeavors to vindicate those rights whenever threatened.

The Union appears here because of its conviction that petitioner has been "subject for the same offense to be twice put in jeopardy" within the meaning of the Fifth Amendment. This issue has been decided adversely to him in the courts below.

Facts

The facts are not in dispute and are adequately summarized both in the opinion of the Court of Appeals and petitioner's brief. It must be emphasized, however, that during the course of petitioner's trial, the court on its own motion declared a mistrial. The Trial Court stated that the mistrial was declared because of the conduct of the prosecuting attorney, apparently in the examination of a witness. Petitioner was retried and convicted.

Question Presented

Whether the declaration of a mistrial by a Federal Court in a criminal case on its own motion without the consent of defendant, because of alleged misconduct on the part of the prosecutor, gives rise to a plea of former jeopardy under the Fifth Amendment upon retrial?

Argument

The constitutional prohibition against double jeopardy is absolute on its face. It applies not only where there has been a prior conviction or acquittal, but also where a prior proceeding has been terminated before verdict without the defendant's consent. *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Wade* v. *Hunter*, 336 U. S. 684, 688 (1948); *Kepner* v. *United States*, 195 U. S. 100, 128 (1903); *Cornero* v. *United States*, 48 F. (2d) 69, (9th Cir. 1931).

Clearly then, a second trial for the same offense even where the first trial does not result in a verdict, is as constitutionally abhorent as multiple punishment or retrial for

the same offense after acquittal. The plain and salutary policy is to save the defendant from vexatious harassment of multiple trials whether the first trial terminated because of the prosecutor's plea of *nolle prosequi* (*United States* v. *Farring*, 25 Fed. Cas. 1042, 4 Cranch C.C. 465 (C.C.D.C., 1834)); or because of the absence of witnesses (*Cornero* v. *United States, supra*); or because of minor misconduct by defendant's own attorney (*United States* v. *Whitlaw*, 110 F. Supp. 871 (D.C.D.C., 1953)); or simply because of the court's inclination "to allow a prosecutor who has been incompetent or casual or even ineffective, to see if he cannot do better a second time" (Frankfurter, J. concurring, *Brock* v. *North Carolina*, 344 U. S. 424, 429 (1952)).

However, in *United States* v. *Perez*, 9 Wheat. 579 (1824) this court at an early date carved out an exception to the rule. There, after the failure of the jury to agree on a verdict, the court discharged the jury without the consent of the defense or prosecution. On retrial the defendant raised the plea of former jeopardy. Justice Story, a stalwart protector of the constitutional defense against successive trials for the same crime* in writing the opinion of this court, was confronted with a dilemma. This case presented a countervailing policy in favor of the orderly and expeditious administration of justice. The spectre of a jury hopelessly deadlocked, with the trial court hesitant to discharge it lest the guilty go free on a subsequent plea of former jeopardy, pressed for a construction of double jeopardy to mean that a jury in such a case could be discharged, without doing violence to the doctrine.

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* His strong abhorrence of successive trials is marked by his insistence in a later case that a new trial in a criminal case could not be granted to anyone, not even to a defendant, *United States* v. *Gilbert*, 25 Fed. Cas. 1287, C.C. Mass. 1834.

But the construction was couched in carefully phrased cautionary language. Discharge without jeopardy can only result from "manifest necessity" or "urgent circumstances" for "very plain and obvious causes". In *United States* v. *Gilbert, supra* 1295, Justice Story again alluded to the problem and used such phrases as "pressing necessity", a power to be exercised "with extreme caution".

Petitioner here has suffered the burdens of harassment of successive trials. To suggest, as did the court below, that the defendant was in no way harmed by the first brief trial, ignores the doctrine on which the constitutional protection rests,—that a person should not be tried twice for the same offense, irrespective of the length of the first trial. To suggest also that petitioner seeks absolution for a crime "proven quite completely" on the second trial, makes a mockery of the constitutional protection.

Since petitioner has stood twice in the dock for the same offense, the only issue is whether the orderly administration of justice or as stated in *Perez* "the ends of public justice" or indeed, in any other policy, can justify the esult.

The court below purportedly relied on *Perez*. An analysis of its opinion makes it clear that the Court of Appeals has in fact fashioned an entirely new theory, which creates considerable risks for defendants and fritters away the constitutional protection.

The trial court's avowed reason for declaring the mistrial, was the conduct of the prosecutor in the examination of the witness. The Court of Appeals reading the record, could find no evidence of misconduct. The appellate court

found "that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions." The court, moreover, could not even determine what the trial court thought were the acts of misconduct of the prosecutor. Nonetheless, the Court of Appeals reached the conclusion that the trial court was acting to protect the rights of the defendant. From the record an inference that the trial court acted through whim, intemperance or desire to permit the prosecutor to retry his case is equally permissible.

Under the erroneous theory propounded by the Court of Appeals it does not matter whether the record itself supports a finding that would warrant the trial court's fears of prejudice to the defendant. It is sufficient, held the Court of Appeals, that the trial court *believes* that defendant may be prejudiced. The purported justification for this extraordinary view is that the trial court must "retain control of his courtroom", even if he is "overzealous" in performing his affirmative duties.

If the Court of Appeals is correct, the mandate of *Perez* for "extreme caution" under "urgent circumstances" is forever dissipated. Pressing necessity as a justification for multiple harassment is now replaced by the trial court's right to command his court. The fingerhole in the dike created by *Perez* has become a yawning chasm.

Objective standards for testing the exercise of discretion is thus replaced by amorphous subjective reactions of the trial court. Such subjective responses of the trial court, impossible of ascertainment for purposes of review, should not and cannot be the countervailing public policy justifying an exception to the constitutional prohibition against repeated trials for the same offense.

We concur with petitioner that the determination here offends the rule in Perez. But we likewise agree with the dissent below that the *Perez* rule is analytically inadequate. The very fact that the majority below could find something in *Perez* to sustain its view, documents this conclusion.

The critical factor, we submit, is that the trial court acted here without the consent of the defendant and on its own motion. It not only took command of the proceedings, but at the same time relegated to a secondary role the right of the defendant and his counsel to make a meaningful choice.

But surely the decision lies more properly with the defendant. Only he can gauge the risks of prejudice in the present trial against the harassment of a subsequent proceeding. Only a motion by defendant's counsel with the concurrence of the court can insulate the determination from whim and caprice. If the defendant does not believe himself prejudiced the *sua sponte* determination of the trial court must not end the trial.

There may be circumstances where the trial court must act without the consent of the defendant and without fear that jeopardy will attach. The facts in *Perez* present such a situation and at the same time suggests a more adequate standard: *the trial court may declare a mistrial on its own motion without the consent of the defendant and without giving rise to a plea of former jeopardy only when events during the course of the trial prevent its expeditious conclusion.*

Such a rule will justify the result in *Perez* where the jury was unable to agree after a reasonable time. It will

explain those cases where a juror or either of the parties or the judge became incapacitated during the course of a trial.

In *Wade* v. *Hunter, supra,* 336 U. S. 684 (1948), petitioner, a soldier was tried before a general court-martial in Germany during hostilities. After the commencement of the trial it was continued to permit the prosecutor to secure the presence of unavailable witnesses. Thereafter, petitioner's unit advanced further into Germany. His commanding general withdrew the charges stating:

> "Due to the tactical situation, the distance to the residence of such witnesses has become so great that the case cannot be completed without a reasonable time." (at p. 687)

The case was then referred for trial to a unit stationed near the scene of the crime. This court held that the plea of double jeopardy was unavailing. Here again, the standard way proposed would sustain the result.

Conclusion

The petitioner has been subjected to the harassment of successive trials prohibited by the Fifth Amendment. The determination of his first trial, it is submitted, resulted from nothing more than the caprice of the trial court. The standard of extreme caution required by *Perez* was surely not met. The theory suggested by the Court of Appeals relating to the obligation of the trial court's affirmative duty to control his courtroom reduces the constitutional protection to a rule of procedure. The *Perez* rule, despite its requirement for extreme caution, is nonetheless too

vague a standard, as the present case illustrates. The only justification for a discharge of the jury by the court on its own motion without the defendant's consent, ought to be events which prevent the trial from coming to an expeditious conclusion. Judged by this rule, the petitioner should be discharged.

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